United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7132

United States Court of Appeals

For the Second Circuit.

CHARLES JAMES,

Plaintiff-Appellee,

against

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY AND CANISTEO; STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1; CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Defendants-Appellants.

DEFENDANTS-APPELLANTS' BRIEF.

HARRY TREININ,
Attorney for Defendants-Appellants,
11 East Market Street,
Corning, N. Y. 14830
(607) 962-3167

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES JAMES,

Plaintiff-Appellee

vs.

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1, of the towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK: EDWARD J. BROWN, District Principal, Central School District No. 1; CARL PILLARD, Principal, Addison High School and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Defendants-Appellants

APPELLANTS' BRIEF

QUESTION PRESENTED

Does a teacher have a constitutional right to wear an emblem expressing his personal political views on an emotionally charged political issue dividing the country, in a class where he is teaching English poetry, without presenting the entire range of information available in relation to such issue, contrary to the Code of Ethics of his profession and the direction of the Commissioner of Education of the State of New York?

PRELIMINARY STATEMENT

Plaintiff was dismissed by the defendant school board, for wearing a black armband in the school on the Vietnam Moratorium Days. He appealed to the Commissioner of Education of the State of New York who upheld the position of the Board.

Thereafter, plaintiff filed the present action. Judge Burke, of the New York Western District, dismissed the complaint; thereafter, this Court, in James vs. Board of Education, 461 F2d, 566(2nd Circuit 1972) reversed. Certiorari was denied. 409 US 1042 (1972).

A trial was held before Judge John T. Curtin on July 9, 10, and 11, 1974, after which judgment was rendered in the amount of $20,964.25 in favor of the plaintiff. Judge Curtin also awarded attorneys fees and directed that a statement in reference thereto be filed by plaintiff's counsel on March 3rd. This has not been done and counsel has requested the Court for permission to postpone the filing until after the argument of this appeal.

This is an appeal from the judgment rendered by Judge Curtin.

Plaintiff made a motion for summary affirmance which was denied by this court on March 11, 1975.

STATEMENT OF FACTS

This action is brought by a public high school teacher who claims that his probationary appointment was terminated in violation of his constitutional rights.

The plaintiff wore a black armband on Moratorium Days on November 14 and December 12, 1969, despite directions by his superiors to remove it. He was suspended and later dismissed under circumstances that will be more fully explored herein.

He first brought his complaint to the Commissioner of Education of the State of New York.

The Commissioner determined that the wearing of the armband "is a form of speech and subject to the strictures of sound pedagogy". (p. 31a)

The Commissioner dismissed the appeal. In so doing, he stated:

> "It is a matter of fundamental educational policy that whatever subject of instruction may be involved, the teacher must present the entire range of information available in relation to such subject. If the subject matter involves conflicting opinions, theories or schools of thought, the teacher must present a fair summary of the entire range of opinion so that the student may have complete access to all facts and phases of the subject. Petitioner in this case, in wearing the black armband in his classroom, was presenting only one point of view on an important public issue on which a wide range of deeply held opinion and conviction exists."
>
> 10 Ed. Dept. Reports, 58(1970)

Thereafter, plaintiff brought this action. The District Court dismissed the complaint. On appeal, this Court remanded, 461 Fed. 2nd, 566 (1972). The Supreme Court denied certiorari, 461 US 1042 (1972). A trial was held before Judge Curtin after which judgment was rendered for the plaintiff. After appeal by defendants, the plaintiff made a motion for summary affirmance which was denied on March 11, 1975.

A. Historical Background

The full import of the events upon which this action is based can be properly weighed only with the background in mind of the tenor of the times during which they occurred.

The Vietnam war was in full swing. Campus riots were common. It was a period of great tension and emotion..... a time of torment and anguish. (Dr. Clark, EBT pp. 15, 16, App 219a-250a)

Large numbers demonstrated against the conduct of the war. On November 15, 1969, the day after the first Moratorium Day, plaintiff tells us he participated in a demonstration in Washington, D. C., in company with a crowd estimated to number over five hundred thousand people. *(p.94,App 410a) They were demonstrating their opposition to the conduct of the war. There were countless other demonstrations throughout the land.

*All references to the trial record will be indicated as "(p.)"
*All references to the appendix will be indicated as "(App)"

Surveys, however, indicate that about seventy per cent of the people supported the actions of the government.(p.92,App 408a) We were a nation divided.

As noted by Justice Black in his dissent in Tinker v. Des Moines, 89 S. Ct. 733, p. 745):

> ".....members of this Court, like all other citizens, know, without being told, that the disputes over the wisdom of the Vietnam war have disrupted and divided this country as few other issues ever have."

Naturally, the protests monopolized the news media. The Moratorium Days were historical events.

It is against this background -- a nation tormented and divided -- the protests of many against the action of the government -- more believing that the government be upheld (p.91,92,App 407a-408a) that these events must be evaluated.

Plaintiff tells us he wore the armband which gives rise to the action in the context of the events of the time because it was a Moratorium Day. (p.58, App 374a) He allied himself with the people who felt that carrying on the war was wrong.(p.91,App 407a)

B. The First Moratorium

Plaintiff had been hired by the Addison School District to teach English. He began his duties in September, 1969.(p39,App 355a) On November 14, 1969, the first Moratorium Day, he appeared

at the school wearing a black armband (p.40, App 356a) about two to two and one-half inches wide.(p.41, App 357a)

After taking care of his homeroom duties, which lasted about fifteen minutes (p.43,App 359a) and a free period of about forty-five minutes, he commenced teaching a class composed of high school juniors. It was an English class and the lesson plan called for the teaching of poetry. (p44, App 360a)

In response to a call from Mr. Pillard, the school principal, Mr. James went to the principal's office (p45, App 361a) There he was asked why he was wearing the armband. "Because I am against killing", was the reply. (p49, App 365a)

Mr. Pillard stated that the wearing of the armband was political and against the President of the United States (p49,App 365a) and that it would have to be removed. After some hesitation plaintiff refused to do so. He then was asked to see Mr. Brown the District Principal. (p50,App 366a)

The meeting, which plaintiff testified lasted from twenty to thirty minutes (p52,App 368a) and which Mr. Brown judged to be thirty to forty-five minutes in duration (p208,App 524a) was conducted in a low key and was carried on in a gentlemanly manner. (p125, App 441a)

Mr. Brown explained to plaintiff that he considered the wearing of the armband a political activity, contrary to

the Teachers Code of Ethics and disruptive to the educational process. (p207,App 523a)

Plaintiff was assured that there was no question as to his right to express any political views which he may have or to participate in any political activities he might desire when not on duty as a teacher of the school.

Mr. Brown stated that there was no question but that teachers could and should discuss controversial issues in the school when they were timely and pertinent to the course being taught; but the right so exercised carried the obligation to present, objectively, all known points of view on the issues. Even then, the teacher could make known his personal views -- emphasizing the rights of others to hold opposing views.

Mr. Brown wanted to obtain legal counsel as to the correctness of his action.(p209,App 525a) In the meantime, he insisted that Mr. James remove the armband before resuming his teaching assignment. This Mr. James refused to do. He was suspended.

C. The Period Between the Moratorium Days

The next day, while plaintiff was in Washington, joining thousands of others in protest of the actions of the government, the School Board met.

As a result of that meeting, a letter was delivered to plaintiff's home that evening. It read:

> "The Board deems your action to be a political act. As such, it is prohibited in the school. It is also deemed unethical action on the part of a teacher to engage in such activities.
>
> "You may return to class on Monday, November 17, 1969, with the understanding that you engage in no political activity while in school.....
>
> "Of course, the Board recognizes fully your absolute right to express outside of the school any beliefs that you may have. (p56, App 372a)
>
> Very truly yours,
> Robert H. Andrews,
> President, Board of Education.

Mr. James returned to his duties on Monday, November 17, 1969. (p56, App 372a) He taught without incident (p132, 133, 136, App 448a, 449a, 454a) During the period he voiced no disagreement with the conditions established by the Board's letter for his return. (p155, App 471a)

C.1 The Directive from the State Department of Education.

In the interim, a directive from Dr. Johnson, a New York State Assistant Commissioner of Education, had reached the school. It explained the position of the New York State Education Department with respect to days of special significance.

It recommended that consideration be given to the following factors:

> "3. The school posture should be neutral and objective. Administrators and staff members

should avoid taking positions on controversial matters that may reflect on the objectivity of the school.

"4. If controversial statements are to be made by others, efforts should be made to assure that all sides of the question are given appropriate attention." (underlining supplied for italics)

This memorandum was discussed at a faculty meeting and came to the attention of plaintiff (p.160, App 476a)

C.2. The Joint Code of Ethics

Another document that plaintiff was aware of during this period was the joint Code of Ethics adopted by the New York State Teachers Association and the New York State School Boards Association. Plaintiff tells us that at one time he was a member of the committee on ethics (Defendants' exhibit 1, EBT p.138). (App 227a)

That document contains the following admonition:

"4. The teacher and the school recognize their obligations to develop growing appreciations and understandings of the principles of democracy. They refrain from using the school to promote personal views on religion, race or partisan politics." (underlining supplied for italics)

Mr. James also agreed with the statements in the Code that:

"In fulfilling his obligation to the student, the educator shall not, without just cause, restrain the student from independent action in his pursuit of learning and shall not without just cause deny the student access to varying points of view."

".....The educator shall not use the institutional privileges for private gain or to promote political candidates or partisan activities."

"..... the use of the school for..... political activity is improper."

With this statement, plaintiff tells us he agreed. (EBT p140 &170, App 229a and 486a)

Another occurrence took place during the period. The Teachers Assn. adopted a resolution supporting the action of the Board. Mr. James was present at the meeting. (p135, App 451a)

He gave no consideration to meeting with the Board or Administration before wearing the armband on the second occasion. (p141, App 457a) Based on advice he received, he felt that his act was valid and that regardless of the feelings of the Board, he was within his rights (p142, App 458a); this despite the fact that he recognized there was an honest difference of opinion with the Board. (p142, App 458a) He considered their opinion valid and anticipated that they would not be happy with his wearing the armband the second time. (p144, App 460a) Rather, he expected the Board to come to him with an apology. (p144, App 460a)

D. The Second Moratorium Day

Knowing that it would meet with the disapproval of the Board, (p144, App 460a) plaintiff made up his mind to wear the armband on the Second Moratorium Day. This decision was made under circumstances vastly different from those existing on November 14. In the meantime:

1. The Board had made its determination as to the

propriety of wearing the armband known to plaintiff.

2. The State Department of Education had issued its memorandum. It had been discussed at the faculty meeting and had come to the plaintiff's attention.

3. The Faculty Association had passed a resolution supporting the actions of the Board of Education.

4. The news media had given the events of November 14 wide coverage (p.216,App 532a)

5. The students of the school and the citizens of the District had reacted to the situation (p.216, App 532a)

6. Plaintiff had the benefit of consultation with his advisors and time to ponder his position in relation to the Johnson memorandum and the Code of Ethics.

It is to be pointed out that while Mr. James had adequate opportunity to assess his position, Mr. Brown was caught unaware by Mr. James' appearance wearing an armband on the second occasion.

Mr. Brown, after the Board's meeting on November 15, had no occasion or need to consult with counsel or to consider the alternatives open to him in the event there was a repetition of the first incident. He was caught off-guard. He had a right to assume by Mr. James' return to work, without protest or comment, that he had accepted the conditions of the Board's letter

and the matter had been resolved.

Again, a meeting with Mr. Brown -- about twenty minutes in length (p218, App 534a) at which they engaged in a low key discussion. (p219, App 535a) Suggestion was made that he remove the armband under protest, and that the parties cooperate to submit the matter to the Commissioner of Education or to the Courts. (p219,App 535a) The possibility of grievance under the Civil Service Law was discussed. None were accepted by plaintiff.(p221, App 537a)

E. The Attempted Meeting

At this point, it might be well to contrast the opposing attitudes of the parties. After the first incident, the Board immediately invited plaintiff to return to his post. As far as the Board was concerned, on his return, the incident was over.

Mr. Brown, after the first incident, felt that thematter was amicably resolved (p240, App 556a) and Mr. James' posture during the interim period reinforced that conclusion.

A meeting was to be had between plaintiff and the Board (p155, App 471a) but it was cancelled by plaintiff.

He insisted on a formal hearing.(p66,App 382a) The fact that the relevant statute dictated otherwise (see Sec.3013, Education Law) and was beyond the authority of the Board, was apparently of little moment to plaintiff.

The fact that a probationary teacher under New York law may be dismissed without a hearing has oft been determined.

Matter of Grace v. Bd. of Ed.,19AD 2d,637(1963)

Matter of High v. Bd. of Ed. 169 Misc.98 aff'd 256 AD 1074, aff'd 281 NY 815 (1935)

Matter of Hickey v. Carey, 275 AD 964 (1949)

Matter of Pinto v Wystra, 22 AD 2d, 914 (1964)

Matter of Butler v. Allen, 29AD 2d, 799 (1968)

Nevertheless, despite the fact that there would be just as much an interchange of points of view regardless of the name attributed to the meeting, the plaintiff cancelled his expected appearance and awaited the Board's apology.(p144, App 460a) He did not return to the Board and ask them to change their minds. (p167,App 483a)

At the examination before trial, the following revealing answers were offered in reference to the meeting that had been arranged:

"Q Even though you asked them and it was granted, you didn't take the offer?

A Granted, in true Quaker fashion I changed my mind.

Q You did want the opportunity to express your views?

A Not under those conditions.

Q Did you ever state the conditions to the Board under which you would welcome the hearing?

A Well the error was mine, I should have been more defensive.(definitive ?)

Q You admit you made an error in not attempting to communicate with the Board?

A Well not making known what kind of hearing I wanted.

Q What did you want?

A I wanted a hearing, I should have asked." (EBT p109,App 198a)

THE MEANING AND IMPACT OF THE ARMBAND

A. Mr. James' Testimony

Admitting that he wore the armband only on Moratorium Days, Mr. James allied himself with the great protest that was taking place in an effort to bring to the attention of the Executive the fact that the war was being waged unconstitutionally.(p 96, App 412a) And although he intended the protest in the format of a religious statement, its ramifications had political implications. Plaintiff admits that what to his mind stems from the religious may appear political to others. (p144,App 460a)

Appreciating that symbols can arouse passionate feelings (p120,App 436a) he intended to wear it the entire day, not only in the classroom, but in the corridors, lunchroom, study hall and wherever else he was scheduled to appear in the school on that day. (p120,App 436a)

He gave thought as to the effect it would have on the students.(p121,App 437a)

He admitted on the examination before trial that he knew

that "the armband stood in the pupil's mind as an expression against participation in the Vietnam war"(p122, App 438a) and that to some the wearing of the armband was against the policies of the administration in Washington.(p 123, App 439a)

This was consistent with the reply filed in his behalf before the Commissioner of Education wherein it was alleged that the wearing of the armband was "a symbol of an opinion by plaintiff and was intended to convey, to all who cared to observe, the opinion and association of plaintiff with respect to the acts of the administration of the government of the United States and its conduct of the war in Vietnam....." (p175,App 491a)

In an affidavit in this action, sworn to in September, 1971, in paragraph 7, in explaining the purpose of the armband, plaintiff stated:

> "I attempted to explain that the armband was motivated not merely by political opposition to the war in Vietnam, but by my religious aversion to war in any form." (Defendant's exhibit 6)

There was never any doubt in his mind that the Board of Education considered the wearing of the armband a political act. (p124,App 440a)

All those concerned in this action were in agreement on this point, it seems.

B. Dr. Clark's Testimony

Dr. Clark, the plaintiff's expert, considered the wearing of the armband "an expression of opposition to the continuation of the war in Vietnam" and against the policies of the President.(EBT p19,App 225a) The armband had political implications. (EBT p20,App 226a)

C. Dr. Terino's Testimony

To Dr. Terino, the armband represented not only a form of protest against the continuation of the war. It was also the representation of one side of a controversial issue (p297,8,App 613a-614a) having an impact on the student that cannot be measured, because the reaction is internal.(p299,App 615a) He referred to it as "this propagandistic device or indoctrination". (p300, App 616a) In his opinion, it intruded on the work of the school, (p306,App 622a) the intrusion consisting of the failure of the school to consider the issue by having all sides discussed.(p315, App 631a)

He claims that the intrusion was more noticeable on the second occasion (p318, App 634a) and put the burden on Mr. James, from an ethical standpoint, of informing the Board that he was going to wear the armband again. (p318,App 634a)

He points out that:

> "While the interest of discipline may not have been jeopardized - incidentally, they were jeopardized, who knows that (what) could have happened there -- The interests of sound education were jeopardized". (p350,App 666a)

D. Dr. Sheldon's Testimony

To Dr. Sheldon, the armband was a protest against the war in Vietnam. It was a political symbol. (p408, APP 724a) For a high school teacher to wear it represented very poor pedagogy and took away every right the student had educationally. (p408, App 724a)

In his opinion, it materially or substantially jeopardized the interests of sound education. (p414, App 730a)

The wearing of the armband on the second occasion was a disruption to a greater degree than the first instance. (p410, App 726a)

By simply wearing the symbol, the teacher has engaged in very poor education.(p421,App 737a)

The children were denied the benefit of an exchange of ideas as to its meaning and constituted indoctrination. (p415,App 731a) This was bad educational practice. (p416,App 732a)

I

IT WAS IMPROPER FOR PLAINTIFF TO WEAR THE ARMBAND

A. On the First Moratorium Day

Dr. Clark tells us that the whole educational system is focused on the student who is there to be taught. The teachers are there in order to serve the students. (EBT Dr. Clark p60,App 296a)

Dr. Sheldon is in perfect agreement. The school is developed by society to serve the children. Everything that goes on in the school should be devoted to their welfare. (p398,App 714a) The teacher is a servant of the children in his class. He is there for no other reason than to serve the interests of the children. (p405, App 721a)

What has the student a right to expect in the context of the situation with which we are concerned?

He has a right to:

1. An unprejudiced educational environment.
2. An opportunity to learn the things that are important in our society.
3. An opportunity to question the matters presented.
4. To be presented as many points of view as seem pertinent to any particular issue.
5. To question a point of view on the issue. (p400,App 716a)

Specifically, in regard to point 4, Dr. Clark gives wholehearted agreement.(EBT Dr.Clark,p33,App 269a) There isn't any question but that a teacher should present all points of view,

Dr. Clark claims. (EBT p34,App 270a)

Plaintiff agrees that the teacher should refrain from using the school to promote personal views on religion, race or partisan politics. (p170,App 486a)

That the armband was a symbol having political implications, plaintiff's expert agreed. (EBT Dr. Clark p19,App 255a) As has been indicated, he is joined in this conclusion by Dr. Terino and Dr. Sheldon.

Was Mr. James using the school to promote partisan politics and denying his students all points of view on a highly controversial issue?

Dr. Clark argues that it was Mr. James' right as a human being to wear the symbol of his concern.(EBT p12,App 248a) He is opposed to interference on the part of educational officials in the "private concerns" of teachers. (EBT p21,App 257a) As an educator he claims that the educational aspects of the armband are not relevant. As a citizen, Mr. James had a right to wear the armband, and educational officials have no right to interfere.(EBT p47,App 283a) The same is true of the teacher in the classroom, according to Dr. Clark.(EBT 40,App 276a)

In other words, he views the problem in a vacuum - without any consideration being given to the plaintiff's role as a teacher in a classroom, and the rest of the school. He judges

the action on the basis that plaintiff is a person acting privately without any obligations as a teacher. No thought is given to the fact that he is appearing in a classroom, before students who have rights in the teacher-student relationship. Applying Dr. Clark's assertion that the teacher is present to serve the students (EBTp60, App 296a) we may say that the right of the students to be presented all sides of a question is superior to Mr. James' right to make his views known.

These assertions by Dr. Clark are surprising in view of his expressed agreement with the canon of ethics providing that a teacher

> ".....shall not use institutional privileges.....to promote.....partisan political activities".

Asked whether he agreed with the statement, he replied:

> "Unquestionably. I would consider that (the violation thereof) not only a breach of ethics, but a personal and professional crime."(EBT p28,29,App 264a-265a) (Underlining supplied)

How Dr. Clark equates his answers with his admission that Mr. James' armband was an expression of opposition to the war and against the policies of the President (EBT p19,20, App 255a-256a) is not apparent. How can any claim be made that Mr. James was other than a teacher when he appeared before his class?

Dr. Clark disclaims an intent to give approval to a teacher using his position as a teacher and his authority in a sort of subtle force of power to attempt any kind of political

indoctrination (EBT p264,App 262a) and he insists that:

> "Any teacher who uses his or her power to indoctrinate a student or his students with a particular partisan, political, social, racial point of view, is violating the rights of his students and violating his codes. I said that over and over again." (EBT p61,App 297a)

Yet he claims that this symbol is not objectionable.

However, he tells us, other symbols are not to be tolerated-- the swastika, the KKK regalia, or the Confederate flag are the examples given. (EBT p48,App 284a)

"There are ideas and ideas",

the doctor tells us.

A reply automatically comes to mind:

> "Yes, doctor, those that you are in favor of and those that you oppose."

To reinforce his contention, the doctor gives his personal point of view,

> "that the right of the person who has a deep moral concern about the Vietnam war should in no way be abridged,"

but he would not accord similar status to one who desires to display his concern by the use of the swastika, or the confederate flag. (EBT p50,App 286a)

To contend that the situation be judged apart from Mr. James' role as a teacher in the classroom lacks all logical basis. He admits that the teachers are in the classroom to serve the students; that is the whole purpose of the school(EBTp60,App 296a)

but would not give primacy to the students' right to have the benefit of all points of view on a controversial subject over the teacher's desire to express an opinion. (EBT p60,App 296a) He even refuses to ascribe to the armband the power to convey an idea -- it is only an expression of concern. (EBT p64,App 300a)

His whole testimony is based upon the premise that plaintiff had an absolute unqualified right to wear the armband (EBT p70, App 306a) regardless of time, place or circumstance. But the swastika is different because it is an expression of identification with something barbaric. (EBT p71, App 307a) The fact that some might ascribe to the black armband, in the context of the situation, kinship with a cause allied to another barbarism makes no difference to the witness.(EBT p72,App 308a)

The fallacy in Dr. Clark's testimony is clear. He is testifying not as an educator discussing an educational problem; he speaks as a person having strong views on the Vietnam war, arguing the right of another person to express similar views. No consideration is given to the "where and when" of the situation in which the views are expressed.

> "I identified myself with those people who believed that (the war) was unfortunate and if that rules me out as an objective witness, so be it." (EBT p72,App 308a)

However, we have the testimony of witnesses whose whole backgrounds stem from the pre-college level. Dr. Clark's ex-

perience is solely in the college field. (EBT p4, App 240a)

Dr. Terino, who taught both Social Studies and English for many years, and specializes in those fields, tells us that

> "the wearing of anything that represents one side of an issue is, in a certain sense, a form of indoctrination.....a form of propagandizing". (p298,App 614a)

The wearing of the armband had an educational impact on the student. (p299,App 615a) In the classroom, the right of the teacher to express his point of view was subject to the obligation that all points of view be presented.

Dr. Sheldon was for many years a teacher, vice principal and principal. (p396,App 712a) He denies the right of a teacher to walk into a classroom and allow his personal views to prevail without the students being afforded the opportunities to which they are entitled. (p400, App 716a)

> ".....as a teacher I have no right to prevail upon the students with my own personal opinions, without giving them the opportunity, as best I am able, to view the other thoughts on it, to exercise their own thinking, to ask questions which may be pertinent to their own perceptions which may be quite different, to their own family background, to their own community background, and how that community feels about issues, and at that particular time I am the servant of the children in that class."(p405,App 721a)

By wearing the symbol, the teacher says just one thing to them.

> "This is the way to go; I go this way." (p409,App 725a)

The mere wearing of the armband, absent discussion, ".....took away the rights.....to question and to be informed, and to have the opportunity to see this in terms of his perception, maybe to have his perception changed by a good teacher." (p.422,App 738a)

The teacher was in the classroom to serve the students and in this case he must set his personal rights aside in the interests of good education of the children in his class. (p.423, App 739a)

The approach of the latter two witnesses is that of educators discussing a problem in education in the light of educational considerations. Their testimony is entitled to consideration over that of Dr. Clark, who candidly questions his own role as an objective witness. (EBT p.72, App 308a)

Another aspect of Dr. Clark's testimony deserves consideration. In reply to queries as to the necessity of presenting all sides of the issue, he differentiates the wearing of the armband in the classroom from a"discussion"of its meaning. He admits that a teacher should give all sides of the issue, if it were a matter of discussion. (EBT 34, App 270a)

He agrees with the Code of Ethics requiring the presentation of all sides (EBT 35, App 271a)/but he premises his testimony on the basis that plaintiff was not discussing the issue, and therefore was not obligated to discuss all sides. He felt restrained by the

statement of the case given by plaintiff's counsel to him. (EBT p36,App 272a) He tells us that he differentiates the right to wear the armband "from the involvement of the teacher in his or her professional role of communicating ideas verbally".(EBT p37, App 273a)

The idea is reinforced by his later statement:

> "I do not consider the wearing of the armband to be synonymous with the teaching of a lesson." (EBT p37,App 273a)

All of Dr. Clark's testimony is premised on the consideration that Mr. James is to be judged other than as a teacher, acting as such, before students in a classroom.

It is submitted that a teacher before this class cannot claim a dual role -- one expressing his own feelings as a private person -- the other, as a teacher, performing the duties for which he is hired.

Plaintiff did not reserve the right to devote himself only partially to his teaching duties while before his class and in the school.

As stated by Dr. Sheldon:

> "Everything that goes on in the school should be devoted to the welfare of the students."(p398,App 714a)

B. On the Second Moratorium Day

As pointed out (pages 9 and 10 supra) plaintiff is in a vastly different position on the second Moratorium Day compared to the first. Without attempt at discussion of the issue with

the Board or the Administration, he wore the armband again.

Dr. Terino states that the intrusion on the educational process would be more noticeable than on the first occasion and raises the question whether professional ethics did not require the service of notice on the Board that he was planning to wear the armband again.(p318, App 634a)

Dr. Sheldon claims that the disruption of the educational process was greater than on the first occasion.

> "The second time could scarcely be construed as error, but as a direct refutation of the policy of the Board of Education and a contradiction of the direction he had been given."
> (p 411, App 727a)

On this phase of the case, the rationale of Mailloux v. Kiley, 323 F.Supp 1387, aff'd 448F2, 1242 is instructive.

In that case, the teacher used a "taboo" word in his teaching. He was fired. There was divided professional opinion as to whether it was appropriate to use the particular word. The Court found that plaintiff's method served an educational purpose.

The discussion of the Court distinguishing the secondary school situation from higher levels of education(p.1392,App)is helpful in understanding the different approach given our problem by

Dr. Clark as contrasted to the testimony of Drs. Terino and Sheldon. It also furnishes guidelines in the evaluation of the problem presented. The Court distinguishes between the secondary school situation and higher levels of education. It states:

> "There are constitutional considerations of magnitude which, predictably, might warrant a legal conclusion that the secondary school teacher's constitutional right in his classroom is only to be free from discriminatory religious, racial, political and like measures. Epperson v. Arkansas, supra, and from state action which is unreasonable, or perhaps has not even a plausible rational basis."

The Court concludes that:

> ".....when a secondary school teacher uses a teaching method which he does not prove has the support of the preponderant opinion of the teaching profession or of the part of it to which he belongs, but which he merely proves is relevant to his subject and students, is regarded by experts of significant standing as serving a serious educational purpose, and was used by him in good faith the state may suspend or discharge a teacher for using that method but it may not resort to such drastic sanctions unless the state proves he was <u>put on notice</u> either by a regulation or otherwise that he should not use that method. This exclusively procedural protection is afforded to a teacher not because he is a state employee, or because he is a citizen, but because in his teaching capacity he is engaged in the exercise of what may plausibly be considered 'vital First Amendment rights'." (underlining supplied)

Plaintiff also claims the violation of his First Amendment rights. But, in our case, he received direct, specific

warning. The letter from the Board and the Johnson memorandum put him on notice that his use of the armband was not permissible to his superiors and the State Education Department.

It is to be noted that in the cited case, the incident was directly connected with the teaching of the class lesson. In our case, plaintiff, acting personally, and not as a teacher, imposed the demonstration of his personal beliefs on the classroom situation. It had no relevance to the subject matter of the class. The factual situation here furnishes a stronger basis for the imposition of the rule enunciated by the Court.

What valid educational objective did plaintiff present? What relevance is there between the armband and the class in poetry? He merely succeeded in interpolating his personal political message where it had neither educational relevance or purpose.

It is significant that, on appeal, the Court indicated that it was not agreed as to whether plaintiff's conduct fell within the protection of the First Amendment.

II

ON THE BASIS OF THE EVIDENCE PRODUCED, THE WEARING OF THE ARMBAND IN THE CLASSROOM CANNOT BE JUSTIFIED.

Of course, the evidence must be analyzed in the light of the criteria established by the decision of the Circuit Court.

In making this analysis, we must be mindful that the opinion was addressed to an order entered by the Court below, dismissing the complaint. It was written on the assumption that all the factual allegations of the complaint are true.(footnote 9)

Now the bare allegations of the complaint have been replaced by testimony of the witnesses and it is on the basis of the testimony that judgment must be made.

What are the rules that the Court tells us must be our guide?

> "Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized whether the danger stems initially from the conduct of students or teachers."(461 F 2d,p. 571)

> "What we require, then, is only that rules formulated by school officials be reasonably related to the educational process and that any disciplinary action taken pursuant to those rules have a basis in fact." (461 F 2d, p. 574)

And finally, the Court concludes with the admonition:

> ".....we disclaim any intent to condone partisan political activities which reasonably may

> be expected to interfere with the educational process." (461 F2d,p.566)

The plaintiff, Drs. Clark, Terino and Sheldon all agree that the wearing of the armband had political implications. The fact that plaintiff wore it only on the two moratorium days, by itself, allied him with those in opposition to the action of the government in relation to the war.

The testimony is consistent with the finding of the Supreme Court in Tinker where the Court determined that even when the armband is worn by students, it is

> ".....to exhibit (their) disapproval of the Vietnam hostilities and their advocacy of a truce. To make their views known and by their example to influence others to adopt them."
>
> 393 US 503, 89 S.Ct. 733,p.740

Recognition is given to the fact that the armband is a propaganda device. It is used "to influence others" and comes within the condemnation of the Johnson memo and the Code of Ethics. The interests of sound education are "materially and substantially jeopardized" when a teacher expresses his partisan position on a political matter dividing the country in the absence of discussion or the opportunity to the student for the expression of other views on the issue presented.

That it was done silently and without comment makes it all the more objectionable. Literally, a placard espousing a political cause is placed before the students and given the impri-

matur of the teacher; no comment is made and no discussion that might lead to the exposure of opposing views is invited.

With the known inclination of youngsters to emulate their teachers and to follow their example, the effect of this display of the teacher's political position requires no further comment.

It should be pointed out that in Tinker, the Court specifically stated that:

> ".....there is here no evidence whatever of petitioner's interference, actual or nascent with the school's work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the school or the rights of other students".
>
> 89 S.Ct,pg 733.

The degree of "interference" with the school's work that has been found objectionable, without review by the Supreme Court, is illustrated by Morrison v. Hamilton County Board of Education, (Tenn. 494 SW 2d 770, cert. den. 414 US 1044).

In that case a teacher on tenure was dismissed for insubordination for refusing to shave his beard. He appeared in school with a beard,only on the first day of the term. That day he was suspended from duty.

The Board acted pursuant to a regulation forbidding dress or grooming,

> ".....that is or may become potentially disruptive of the classroom atmosphere or educational process".

There was no showing of any actual disruption in the classroom as a result of the teacher's wearing his beard.

Nevertheless, the Court held that the school authorities had power to adopt and enforce those rules of grooming for teachers considered necessary or proper to remove extraneous influences from the classroom.

How can one equate the wearing of a beard by a teacher with the wearing of the black armband on the Moratorium Days?

In one situation a teacher is merely adopting a personal mode of grooming. His action had no political connotation whatever. In our situation the armband on Moratorium Days expressed a political stance on an important political issue. In the one situation the action of the teacher at most could induce the males to emulate the teacher's example and attempt to raise beards. In the other, the student is inspired by the teacher to emulate the teacher's political stance without the benefit of the opposing views.

If the wearing of a beard is "interference" with the school's work, how can it be denied that the wearing of the armband more readily falls within that classification?

In our case, students are not let alone. They are subjected to the projection of the teacher's political emblem that conveys his stand on the matter of our country's participation in the Vietnam war and no opportunity for reply is afforded.

Dr. Clark, the plaintiff's expert witness, tells us that the breach of the canon of ethics, providing that a teacher should not use institutional privileges to permit partisan political activities, is a "personal and professional crime". (EBT, Dr. Clark

p 28,29, App 264a-265a) In so stating, he provides the answer to several facets of our problem. He not only characterizes the plaintiff's action in wearing the armband, while teaching and in the school, but characterizes the quality of the "teaching" that it is.

It is interesting to note that the decision of the District Court does not even refer to Pickering, 391 US 563 (1968). This, despite the fact that this Court's previous decision in this case specifically points out:

> "As the (Supreme) Court has instructed in discussing the state's power to dismiss a teacher for engaging in conduct ordinarily protected by the first amendment, the problem in any case is to arrive at a balance between the interest of the teacher, as a citizen, commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public service it performs, through its employees".

No attempt was made by the District Court to utilize the formula mandated by the Supreme Court.

What are the respective rights and obligations of the teacher and student as they enter the schoolhouse gate?

The student is there to be taught. It is for his benefit that the school is organized and the teacher hired. The student becomes entitled to the rights outlined by Dr. Sheldon(supra 17). The teacher becomes obligated to teach in such manner that the rights of the student are not jeopardized.

To repeat Dr. Clark's testimony, the whole educational system is focused on the student who is there to be taught. The

teachers are there to serve the students (Dr. Clark EBT,p60,App 296a)

With those premises supplied by plaintiff's expert and weighed on the scales of the Pickering formula, how do the scales balance?

What is "the interest of the teacher"? To express his views concerning a burning political issue. But no one sought to proscribe his action outside the school house. Only when he sought to express his partisan views to a class that was studying poetry, and while he was in the homeroom and other sections of the school, while opposing views were not presented, did the Board step in.

How important is the claimed privilege of the plaintiff to wear the armband in the school, compared to the serious effect on the educational process as indicated by the testimony? When we consider that plaintiff was hired to teach English, was certified in that subject alone, that the class was not studying Social Studies, how can it be claimed that the "efficiency of the public service" was promoted by his actions?

When the expert produced by the plaintiff tells us that the use of the school to promote political activities is "not only a breach of ethics, but a personal and professional crime" (Dr. Clark, EBT, p29, App 265a), the answer is clearly given.

Any personal desire of the teacher in conflict with the purpose of his employment and contrary to the ends sought by the

public employer must yield to the far more persuasive claims of the students and the purpose for which he is hired; especially, when the interests of the students were so clearly delineated by the Board, the Education Department and the Code of Ethics.

When the Court in Pickering tells us that the teacher's actions of which complaint was made were not objectionable because they "are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom", (391 US,p572) it supplied us with the rule applicable to our case. For, in our case, the evidence is unmistakable -- the teacher's proper performance was "impeded".

With the benefit of the evidence, the relevance of the decision in Goldwasser v. Brown (417 F 2nd,1169 (1969), cert.den. 397US 922, Note 21, Circuit Court decision) cannot now summarily be dismissed.

There, an Air Force civilian employee was assigned to teach basic English to foreign military officers. The charge against him was that in the face of prior warnings that discussions of politics, religion and race during classroom hours was forbidden by Air Force policy, he carried on such forbidden discussion in his classes. Now we can compare the "unduly sacrificed classroom teaching hours" (note 21) of Goldwasser as against the educational "crime" (as Dr. Clark denominates political activity in the classroom) of plaintiff continuing steadily while he wears

the armband in the classroom and throughout the school.

The Court in Goldwasser defined the competing interests as follows:

> "The government's interest as an employer is in heightening the level of the public service it renders by assuring the efficiency of its employees in the performance of their tasks; and efficiency comprehends the maintenance of discipline, the prevalence of harmony among co-workers, and the elimination of conduct which may reasonably be thought to have 'impeded the proper performance' by a teacher of 'his daily duties in the classroom.'(underlining supplied)
>
> "Conversely, the free speech interest of the teacher is to have his say on any and every thing about which he has feelings, provided there is no significant likelihood of his impairment of his efficiency." p.1176

In its decision the court makes specific mention that plaintiff was not teaching "current events, political science, sociology or international relations". p.1177

The Court held:

> ".....observations on Vietnam.....would appear to have, at best, minimal relevance to the immediate classroom objectives."

All these observations are equally relevant in our case.

We can also evaluate the position of plaintiff on the second Moratorium Day, after due warning by the Board and the Department, as compared to the position of Goldwasser after prior warnings and appreciate the similarity of the situations.

We can also give proper weight to the comment in the last clause of Note 13 in this Court's prior decision, to the effect

that a teacher could not "be dismissed merely because he was identified with a particular cause if he did not preach that cause in class". The testimony ascribes an effect to the armband as pervasive as preaching.

Other factors deserve consideration. To uphold plaintiff's position is to give every teacher a platform to seek credence for his favorite cause before a captive audience. Here it may be for a cause deserving of respect and considered worthy by many. We must never forget, however, that many disagreed with plaintiff.

Tomorrow it may be for causes less respected by most. Dr. Clark, favoring the armband, is vehemently against the swastika, the regalia of the KuKluxKlan or a Confederate flag in the classroom. Again, others may feel differently. To uphold the use of the one is to open the door to the use of the other. From the educational point of view, none should be permitted. And since we are dealing with teachers and students in the classroom, educational considerations should be given primacy.

To let one teacher wear an armband makes it mandatory that another teacher wearing an armband, espousing a contrary point of view, be permitted to do so. Inevitably, it would lead to the school's becoming a battleground for opposite political faiths - each seeking adherents not only on the faculty but, above all, in the classroom among the students. Far too many of our

schools have policemen patrolling the corridors to keep the peace between opposing groups of students. We should not give added reason for their presence.

The New York Court of Appeals, in O'Connor v. Hendrick, 184 NY 421, long ago, gave its answer to the situation presented:

> "So, also, it would be manifestly proper to prohibit the wearing of badges calculated on particular occasions to constitute cause of offense to a considerable number of pupils. For example, the display of orange ribbons in a public school in a Roman Catholic community on the 12th day of July." (p.429)

No one argues against the discussion of political issues in our schools. They should be argued and discussed - discussed fully and completely in the proper classes and at the proper times by teachers acting as teachers, in their field of competence, and not by teachers acting as partisans.

The evidence showed that plaintiff advertised a political position. That is what made plaintiff's actions educationally objectionable. The armband, like the billboards or the newspaper ad, is the projection of an idea. It propels its message--it asks no comment in return, and it invites no discussion. It states its position repeatedly, and in the classroom the student does not possess the option to put the newspaper aside or to click off the television set.

With good education as our sole goal there can be only one answer to our problem. We ask plaintiff to sacrifice very

minimally in our striving to insure that the student receives all to which he is entitled.

III

THE COURT SHOULD NOT LIMIT THE OPPORTUNITY OF STUDENTS TO HAVE AVAILABLE ALL POINTS OF VIEW ON ANY SUBJECT.

The Courts have consistently sought to broaden and expand the educational opportunities offered to our future citizens.

The Meyers case, 266 US 390,(1923), wherein the Supreme Court struck down a statute forbidding the teaching of any language other than English to pupils who had not passed the eighth grade. The decision was based mainly on the ground that the statute interfered with the rights of the individual to acquire useful knowledge.

Likewise, in Eperson, 393 US97 (1968)wherein a statute requiring that the teaching of evolution be tailored to the principles of a certain religious dogma, was declared invalid; the Court held that the student should not be subjected to so restricted a curriculum.

At page 103 the Court states:

> "The overriding fact is that Arkansas selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine. That is, with a particular interpretation of the Book of Genesis by a particular religious group."

In our case, the plaintiff sought to foist a particular politi-

cal viewpoint on a political problem besetting the country. He selected from the varying political positions in regard to the Vietnam conflict, the particular position he espoused and sought to inculcate his particular point of view among the various positions available upon his students.

Later in the decision, at page 106, the Court in Epperson states:

> "There is, and can be no doubt, that the First Amendment does not permit the State to require that the teaching and learning must be tailored to the principals or provisions of any religious sect or dogma."

Can it be denied that if the state required that Mr. James wear the black armband on the Moratorium Day, that such action on the part of the state would be unconstitutional? Why should a teacher, on his own volition, have the same authority to affect the education and thinking of his students that would be denied him if he were acting in his capacity as an agent of the State? The reason for the action -- whether state directed or teacher inspired is of little moment. The action taken is the same. The result from the point of view of the student is equally objectionable.

The principles for which we contend have been recognized by the Supreme Court.

Thus, in West Virginia v. Barnett, 319 US 624, the Court stated:

> "Free public education, if faithful to the idea of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party or faction." (p.637)

The importance of neutrality by teachers was recognized by Mr. Justice Frankfurter in Wieman v. Updegraff, 344 US 185, page 196 (1952):

> "That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace of action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible only if habits of open mindedness and critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders from Thomas Jefferson onwards.
>
> "To regard teachers.....in our entire educational system, from the primary grades to the university as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of openmindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept in practice by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry."
> (underlining supplied for italics)

Consistent with these principles are the Code of Ethics and the Johnson Memorandum. They seek a neutral and objective school posture on political controversies.

That is why the Commissioner of Education, in determining plaintiff's appeal, held that:

> "If the subject matter involves conflicting opinions, theories or schools of thought, the teacher must present a fair summary of the entire range of opinion so that the student may have complete access to all the facts and phases of the subject." (App 30a)

In view of the like philosophy of education expressed both by the Court and the head of the Education Department of New York State, the restriction of the exposure of the student to a single point of view on a highly emotional political issue cannot be justified.

IV

UNDER THE LAWS OF NEW YORK, A TEACHER ON PROBATION, COULD BE DISMISSED BY THE SCHOOL BOARD WITH THE RECOMMENDATION OF THE SUPERINTENDENT OF SCHOOLS WITHOUT GRANTING A HEARING.

The law on the matter was summarized by Commissioner Allen in the appeal of Vernon Reyman (decision No. 6703, November 16, 1959, N.Y. Education Department):

> "The employment of a teacher in a school district employing eight or more teachers and under the jurisdiction of a district superintendent of schools is not governed by a contract in the ordinary sense of the word, but constitutes a relationship determined by Section 3013 of the Education Law. The statute prescribes the terms under which the employment commences, continues and terminates. One of the incidents of this relationship is that it may be terminated at any time during the probationary period by unilateral action of the board of education of the employing district upon the recommendation of the district superintendent of schools to that effect.
>
> "Since this relationship may be terminated without notice, charges or a hearing, and since no reasons for their action are required to be promulgated by either the district superintendent of schools, or by the board of education, any allegations or denials of misconduct connected with such

termination of relationship must be disregarded for the purpose of this decision.

> "The broad discretion conferred upon boards of education by this statute is meant to allow local boards to assure themselves of the desirability of having a teacher permanently attached to their school system. The way in which a local board exercises this power will have a profound effect upon the quality of its application in the school system."

The law as so determined has been upheld on many occasions:

> Matter of Grace v. Board of Education, 19 AD 2d 637 (1963);
> Matter of High v. Board of Education, 169 Misc. 98, aff'd 256 App.Div.1074, Aff'd 281 NY 815 (1935);
> Matter of Hickey v. Carey, 275 App.Div. 964 (1939);
> Pinto v. Wynstra, 22 A.D. 2d 914 (1964).

In Helsby v. Board of Education, Claverak, 59 Misc. 2d 943 (1969) p.945, the Court stated:

> ".....It is well settled law that a teacher has no vested rights to tenure during the probationary period and that the services of a probationary teacher may be discontinued without a hearing and without giving the reasons therefor" (Matters of McMaster v. Owens, 275 App.Div. 506; Matter of Hickey v. Carey, 275 App.Div. 964; Matter of Pinto v. Wynstra, 22 A.D. 2d 914; Matter of Butler v. Allen 29 A.D. 2d 799).

Thus, there was no statutory mandate or authority for a hearing.

However, it is important to note a meeting between plaintiff and the Board had been arranged (p.155,App 471a). It was cancelled by plaintiff. As previously noted, whether it

is denominated a "meeting" or a "hearing", an opportunity was afforded to plaintiff and the Board to meet. The same communication could have been had between the parties regardless of the nomenclature attributed to the event.

V

INTEREST IS NOT RECOVERABLE ON THE JUDGMENT.

The defendants claim that interest is not recoverable in the circumstances of this case. The New York courts have not granted interest in a situation as here presented.

In Gordon v. Board of Education, 52 Misc. 2d 175, the petitioner, a teacher, was reinstated to his position with the Board of Education pursuant to court order. It was directed that he be paid his full salary, for the period of his suspension. The direction, as in our case, made no provision for the payment of interest.

The Court held that the petitioner was not entitled to interest. The Court determined that any restitution for damages granted to the petitioner was incidental to the primary relief sought by the petitioner, which in that case, as well as in ours, was reinstatement.

It held that the petitioner had no cause of action for back pay independent of his proceedings for reinstatement and could not maintain an action therefor until he had proven his right to that relief.

VI

ANY INTEREST AWARDED CANNOT BE AT A RATE IN EXCESS OF THREE PER CENT.

Subdivision 3a of the General Municipal Law of the State of New York specifically provides that the rate of interest to be paid by a municipal corporation upon any judgment shall not exceed three per centum per annum.

The District Court ruled that interest at the rate of six per centum was recoverable against the defendants other than the school district. It is submitted that the Court overlooked the fact that each of the said defendants were sued in their official capacities as officers of the school district. As agents of the municipal corporation, interest should not be assessed against them in those capacities at higher rates than that which is assessed against the school district.

VII

ATTORNEY'S FEES SHOULD NOT HAVE BEEN AWARDED.

The Court in its opinion of November 18, 1974 awarded plaintiff counsel fees and directed that:

> "If the amount of attorneys fees cannot be stipulated to within sixty days, the plaintiff may apply on notice, with a detailed statement of services for the Court to set a reasonable fee." (App 80la)

Later, in the opinion of January 30, 1975, Judge Curtin added:

> "If an agreement cannot be reached, plaintiff shall file a detailed statement, setting forth the reason for the granting of a fee. This filing shall be made not later than March 3, 1975. Defendants may respond not later than March 17, 1975. (App 859a)

The only attempt by plaintiff's counsel to reach an agreement as to the fee was a suggestion by him that defendants agree to a fee of one hundred dollars an hour. To this, defendants could not agree.

On March 5, 1975, defendants' attorney inquired of plaintiff's attorney as to the status of the statement required to be filed on March 3rd. Plaintiff's attorney responded by a letter to Judge Curtin, dated March 11, 1975, inquiring whether, in view of the expedited argument ordered on this appeal for the week of April 7th, the Court would have any objection to the detailed schedule of attorney's fees being submitted after the argument.

A hearing may well be necessary on the question of the amount of fees.

We are thus met with the possibility of further questions arising out of this phase of the case, and a final determination not being reached because of the manner in which plaintiff's counsel has failed to respond to the Court's direction. Defendants may be prejudiced by this failure of plaintiff's counsel to comply with the Court's order.

The District Court relied on the holding in Stollberg, 474 Fed.2nd, 485, for the allowance of attorneys fees.

However, that case represents a factual situation far different from that presented here. In that case, the Court recognized that "the award of attorneys fees is restricted to the exceptional case". The standard is whether "the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy" or where a defense has been maintained"in bad faith vexatiously, wantonly or for oppressive reasons". 474 Fed.2nd,485, p.490.

Here no such showings were made. Rather, the Board acted in compliance with the decision of the Commissioner of Education of the State of New York, who held that the plaintiff had acted improperly in wearing the armband. Not to have acted in accordance with the Commissioner's decision would have placed the Board in a position where the Commissioner would have been authorized to withhold state aid from the district or to remove the board members from their office.

Sections 306, 1706 EducationLaw.

They defended this action consistent with their duty to comply with the Education Commissioner's decision. They acted to sustain compliance with the Code of Ethics established jointly by the New York State Teachers Association and the New York State School Boards Association. In addition, they acted in accordance with the provisions of the Johnson memorandum which was

delivered to the school in the period between the two Moratorium Days, which directed the school authorities to take heed that all points of view be presented in connection with the observance of any activities relating to the Vietnam protest.

Since their actions cannot under any circumstances be considered unreasonable, the imposition of the legal fees is not warranted.

VIII

THE CIVIL LIBERTIES UNION CANNOT RECOVER LEGAL FEES.

The New York Civil Liberties Union and the American Civil Liberties Union are corporations incorporated under the former Membership Corporation Law of the State of New York. As shown by the affidavits submitted to the District Court on the question of the amendment of the judgment, these corporations which carried on the litigation of this case had never been granted authority by the Appellate Division of the proper Department to practice law in compliance with section 495 sub.5 of the Judiciary Law of the State of New York. This action was commenced by the New York Civil Liberties Union. All the pleadings were filed under that name. The communications received were signed by Mr. Neuborne, counsel for that organization. Other communications were signed by him on the letterhead of the American Civil Liberties Union, as assistant legal director.

It may be pointed out that the proposed findings of

fact and conclusions of law were signed by Mr. Neuborne personally without reference to any organization. The motion to amend the judgment was similarly signed. However, no order or stipulation of substitution of attorneys has ever been filed.

In the reply affidavit no evidence whatsoever was submitted to indicate that these corporations were ever authorized to practice law. Rather, it relied on the fact that the New York Civil Liberties Union Foundation, an entirely different organization, did have authority. However, it is to be noted that the order granting the Foundation authority, was dated July 18, 1974, a date after the trial of this action was completed.

It is significant that at about the same time this order was entered, the New York and American Civil Liberties Unions ceased to appear in this litigation and Mr. Neuborne began to sign the documents personally. The inference is permissible that having been reminded of the requirements of section 495 of the Judiciary Law, the change in representation was attempted.

We thus have recognition that approval by the Appellate Division is a valid requirement. Also to be noted is that the statement of purpose of neither corporation includes the practice of law. The certificate of the New York Civil Liberties Union confines its activities to the metropolitan area of New York. None of the parties in this action reside or are located in the metropolitan area. Thus it is quite clear that we are met with a

situation where membership corporations, not receiving the permission of the Appellate Division in the Department where they are situated, pursuant to section 495 of the Judiciary Law, have been practicing law.

The courts of New York have rigidly supervised the practice of law by corporations. Without approval from the Appellate Division, pursuant to section 495, subdivision 5, a corporation cannot practice.

> "It follows that the practice of law is not a lawful purpose for a corporation to engage in as it cannot practice law directly, it cannot indirectly by employing competent attorneys to practice for it, as that would be an evasion which the law will not tolerate."

Matter of Co-operative Law Co. 198 NY 479,p484
See also:
People ex-rel Floersheimer vs. Purdy,174 AD 694;
Matter of Bensel 68 Misc. p.7.

A membership corporation engaged "for purposes other than pecuniary profit" is not permitted to represent a creditor in a bankruptcy proceeding.

Merill & Co. vs.Nat'l Jewelers Board of Trade, 90 Misc. 19

Attorneys not admitted to practice in the state have been denied the privilege of recovering for their services.

Fein vs. Ellenbogen 34 NYS, 2nd 789

> "The right to receive compensation for services rendered in the capacity of an attorney or counsellor at law is confined to those persons who are duly admitted and entitled to practice as such in the courts at the time that the services were rendered, and who were then in good standing. This is especially true to services rendered in violation of a statute prohibiting unlicensed persons from practicing law."
>
> I Thornton, Attorneys at Law
> Section 23, page 25

Even an organization to provide attorneys for persons involved in administrative proceedings comes within the provisions of the law and must secure Appellate Division approval.

> Matter of Queens Lay Advocate
> Service, 71 Misc.2nd, 33.

The fact that no fees are charged makes no difference. The statute must be observed. Even where one sought to appear in a justice court, not a court of record, without fee "for defendants who may choose petitioner as their choice of counsel" the Court had summarily denied the petition and held that no person may appear for anyone other than himself in any Court or before any magistrate of the State or give legal advice to another unless he has been licensed to practice as an attorney.

> Jemzuria vs. McCue
> 74 Misc. 2nd 692.

The law is summed up in Matter of Pace, 170 A.D.818, at page 824.

> "It may be taken, therefore, as the law of the State that it is unlawful for a corporation whether domestic or foreign to practice law in this State and that any member of our Bar who assists the corporation in violating the law in this respect, is himself guilty of wrongdoing."

An attorney in that position (much less the corporation practicing law illegally) is in no position to receive a fee. Not only is this result dictated by the decisions but by the principle that no one should be permitted to profit from his own wrong. Riggs vs. Palmer, 155 NY 516.

> "The principal is fundamental that no man shall be permitted to profit by his own wrong. It enters by implication into all contracts and all laws."
>
> Justice Cardozo
> Peo. vs. Schmidt
> 216 NY 321,p341.

The District Court relied on the Aspera case as justification for its determination. In that case, however, the organization had secured Appellate Division approval. The defendants there argued that the corporation did not have specific authority to receive fees.

Here, no Appellate Division approval was ever received to practice law.

The New York Courts have determined that a judgment obtained under the circumstances here present cannot stand.

Where the plaintiff, an attorney admitted to practice in Pennsylvania was retained to render legal services to a New York resident, and the services were performed in a jurisdiction where the plaintiff was not admitted to practice law, he was denied recovery of a legal fee. Under the circumstances, the judgment was void.

Kaplan vs. Berman
37 Misc. 502

In Puma vs. McGonigle, 73 Misc. 35, a judgment rendered on the motion of one as attorney for the plaintiff, who was not admitted to practice, was held void.

Likewise, in Colton vs. Oshrin, 155 Misc. 383, where the Court found that the representation was by one not admitted to practice in the courts of the State, the Court held,

"that all the proceedings had are nugatory and void." (Penal Law, Sed. 271,272; Kaplan vs. Berman, 37 Misc.502; People vs. James, 150 id.390,393; Newberger vs. Campbell, 9 Daly, 102; Puma vs. McGonigle, 73 Misc. 35).

The Court further stated:

> "It is not suggested that the defendant or his attorney of record was aware of the facts with reference to Mr. Weiss, nor is it especially important that the objection was not raised by the plaintiff's counsel sooner. The result is the same. The cases above cited presumably are based on the theory that it would be subversive of the correct administration of justice and of our Courts to permit unauthorized persons to practice as attorneys therein. It is, therefore, not a matter of penalizing any one, (other than persons guilty of the offense), but,rather, a matter of vindicating the dignity of the Court and of an honorable profession that the rule has been established that all proceedings participated in by such an unauthorized person are rendered nugatory and ineffectual. In this view, therefore, actual prejudice to any party need not be shown, but is conclusively presumed."

Likewise, in People vs. James, 153 Misc. 390, page 393, the Court states,

> "It was the opinion of the Court on the argument that the fact that Mr. Sandway conducted the prosecution, although in violation of this section, would not have any effect upon the judgment rendered by the court. On consulting the authorities the court finds itself in error and the cases all seem to hold that where a trial is conducted by a person who is forbidden to conduct the trial of the same it renders the judgment void."(Kaplan vs. Berman, 37 Misc. 502; Newberger vs. Campbell, 58 How. Pr. 313; Puma vs. McGonigle, 73 Misc. 35.)

Proceedings in a suit by a person not entitled to practice are a nullity, and the suit will be dismissed. If the cause has proceeded to judgment, the judgment will be reversed.

6 Corpus Juris, Page 570
Section 13
7 Corpus Juris Secundum
Page 725, Section 16.

IX

THERE IS NO EVIDENCE TO SUSTAIN A FINDING OF THE PRESENCE OF "PRO WAR"SLOGANS IN THE SCHOOL.

The only evidence in the record in reference to pro war slogans in the school is the statement by a witness who claimed that she was told of their presence by "another teacher who had a daughter who was in the class of another teacher".(p.148,App 464a) where the slogans presumably were located.

Certainly no finding can be sustained on the basis of such hearsay evidence.

At page 18 of its opinion (App 798a) the District Court states that "only symbols expressing one side of the war issue

were deemed to be a prohibited political act". However, the Court makes reference to footnote 14 (App 806a) wherein it is indicated that the Court is not referring to the situation in the school or the actions of the defendants, but to an inference he draws from the testimony of Dr. Sheldon and Dr. Terino.

There is a total absence of any legal proof of the presence of such slogans in the school.

X

THE TESTIMONY OF DR. CLARK AND THE LETTER OF DR. DAVIS DO NOT SUPPORT A FINDING THAT THE WEARING OF THE ARMBAND WAS PROPER.

As previously pointed out, Dr. Clark equated the wearing of the armband with a "private concern" of a teacher(supra 18) and that the educational aspects were not relevant. Dr. Clark's testimony is analyzed previously (supra 18-21) and no purpose can be served by the repetition at this point of what was there written. It is sufficient to repeat that Dr. Clark admitted that he identified himself with those people who believed the war was unfortunate and "if that rules me out as an objective witness, so be it".

To buttress his conclusion, the District Court also relies on a letter written by Dr. Davis, former Superintendent of the Elmira School District (Footnote 13, App 805a).

Plaintiff introduced the letter to show lack of job opportunities in the Elmira district. In the course of the letter, Dr. Davis made the comment that he was shocked by the Commissioner's

decision upholding the Board's position in reference to the wearing of the armband.

The Court uses Dr. Davis' statement in the letter as evidence to contradict the evidence of the defendants' experts.

Dr. Davis was not present in court. No cross examination was possible. Under such circumstances, his opinion was not admissible.

The admittedly biased testimony of Dr. Clark and Dr. Davis' letter are not valid bases upon which to base findings in contradiction of the testimony of Dr. Sheldon and Dr. Terino.

XI

THE BOARD OF EDUCATION CANNOT BE HELD LIABLE UNDER THE CIVIL RIGHTS ACT.

Municipalities, including school districts, are exempt from liability under the Civil Rights Act.

The Act provides "every <u>person</u> who.....subjects.....any citizen.....to the deprivation of any rights....."
(42 USCA Sec. 1983) (underlining supplied)

The word, "person", was not intended to apply to municipalities.

Monroe-v-Pape, 365 US,167,187-192 (1961);Harkless v.Sweeney Independent School District, 300 F.Supp. 794, 800-807 (S.D.Tex.1969)

"The complaint fails to state a claim against the school district under the Civil Rights Act because Congress did not intend that municipal corporations be liable for damages thereunder."

Monroe v. Pape.....
Harvey v. Sadler, 331 F.2d 387, 390 (9th Cir.1964)
See also <u>Zuckerman-v-AD 421, F.2nd, 625.</u>

XII

PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED.

Respectfully submitted,

HARRY TREININ
Attorney for Defendants
Office and P. O. Address
11 East Market Street
Corning, New York.

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